

DAVID A. HUBBERT
Acting Assistant Attorney General

ADAM D. STRAIT (Mass. BBO No. 670484)
MICHELLE C. JOHNS (Texas SBN 24010135)
PAUL T. BUTLER (MD Bar No. 9406230037)
Trial Attorneys
U.S. Department of Justice, Tax Division
P.O. Box 683
Washington, D.C. 20044-0683
Telephone: (202) 307-2135
Fax: (202) 307-2135
adam.d.strait@usdoj.gov

Of counsel:
RICHARD L. DURBIN
United States Attorney
Western District of Texas

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, and
TEXAS ASSOCIATION OF BUSINESS,

Plaintiffs,
v.

UNITED STATES INTERNAL
REVENUE SERVICE, *et al.*,

No. 1:16-cv-944-LY

**Defendants' Supplemental
Memorandum Regarding
Remedies**

Defendants.

Pursuant to the Court's oral order at the January 18, 2017, motion hearing, the Defendants respectfully submit this Supplemental Memorandum.

For the reasons set out in the Defendants' Motion to Dismiss (Dkt. 31), the Court should dismiss this case for lack of jurisdiction. Alternatively, the Court should enter judgment in the Defendants' favor. (See Opp. Mot. Summ. J. (Dkt. 43).) But if the Court determines that it has jurisdiction and finds fault with the way the Treasury Department promulgated the Rule, vacating the Rule may not be the most appropriate remedy.

The Fifth Circuit has recognized that, in some circumstances, it is appropriate to remand to the promulgating agency to correct an error while leaving the rule in place. *See Central & SW Servs. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (suggesting that remand is appropriate “when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so, and when vacating would be disruptive” (internal quotation marks and brackets omitted)); *see also Fox Telev. Stations, Inc. v. FCC*, 280 F.3d 1027, 1048-49 (D.C. Cir. 2002) (concluding that remand was appropriate to permit agency an opportunity to explain further even though little disruption would be entailed because of high likelihood that agency could adequately revise explanation). In this case, where the Plaintiffs raise several types of challenges to the Rule and the Court has not yet evaluated them, the Defendants are not in a position to determine whether remand is an appropriate and practicable remedy. However, the Court has authority to remand if it concludes that it has jurisdiction, but that the Rule was

not adequately justified to meet the reasoned decisionmaking requirement. After a remand order, the Treasury Department would have the opportunity to consider whether it wants to explain the Rule more fully, in accordance with the Court's order; to withdraw the Rule; or to take no action in response to the Order and inform the Court of that choice.

Respectfully submitted,

DAVID A. HUBBERT
Acting Assistant Attorney General

Date: February 15, 2017

/s/ Adam Strait
ADAM D. STRAIT (Mass. BBO No. 670484)
PAUL T. BUTLER (MD Bar No. 9406230037)
Trial Attorneys
U.S. Department of Justice, Tax Division
P.O. Box 683
Washington, D.C. 20044-0683
Telephone: (202) 307-2135
Fax: (202) 307-2135
adam.d.strait@usdoj.gov
paul.t.butler@usdoj.gov

MICHELLE C. JOHNS
Texas State Bar No. 24010135
Department of Justice, Tax Division
717 N. Harwood, Suite 400
Dallas, Texas 75201
(214) 880-9762
(214) 880-9741 (FAX)
michelle.c.johns@usdoj.gov

Of counsel:
RICHARD L. DURBIN
United States Attorney
Western District of Texas

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2017, I filed the foregoing with the Court in this case through the Court's CM/ECF system. I further certify that as a result of filing the document with the Court, pursuant to Local Rule CV-5(b), I served a copy of it on the following:

Laura Durfee (ldurfee@jonesday.com)

Michael A. Carvin (macarvin@jonesday.com)

Andrew M. Eisenberg (ameisenberg@jonesday.com)

Gerald Brinton Lucas (blucas@jonesday.com)

Jacob M. Roth (yroth@jonesday.com)

Raymond J. Wiacek (rjwiacek@jonesday.com)

Attorneys for the Plaintiffs

Kathryn Comerford Todd (ktodd@uschamber.com)

Lily Fu Claffee (lclaffee@uschamber.com)

Steven P. Lehotsky (slehotsky@uschamber.com)

Warren Postman (wpostman@uschamber.com)

Attorneys for Plaintiff Chamber of Commerce of the United States of America

Rachel Abelson Harris (rachel.harris@squirepb.com)

Pierre H. Bergeron (pierre.bergeron@squirepb.com)

Charles E. Talisman (charlestailsman@squirepb.com)

Linda Kelly (LK Kelly@NAM.org)

Dylan O. Drummond (dylan.drummond@squirepb.com)

Attorneys for Proposed Amicus National Association of Manufacturers

Date: February 15, 2017

/s/ Adam Strait
ADAM D. STRAIT
Trial Attorney
U.S. Department of Justice, Tax Division